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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 55

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE UNITED STATES, AND EVERETT T. CARPENTER, POSTMASTER OF THE CITY OF LOS ANGELES, STATE OF CALIFORNIA, APPELLANTS

v.

TONY RIZZI, D/B/A THE MAIL BOX

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 58

UNITED STATES OF AMERICA AND THE POSTMASTER GENERAL, APPELLANTS

v.

THE BOOK BIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLANTS

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Central District of California

(App. 21) in No. 55 (*The Mail Box*) is reported at 305 F. Supp. 634.

The opinion of the United States District Court for the Northern District of Georgia (App. 96) in No. 58 (*The Book Bin*) is reported at 306 F. Supp. 1023.

JURISDICTION

The judgment of the three-judge district court in *The Mail Box*, declaring 39 U.S.C. 4006 unconstitutional and enjoining the Postmaster General and the Postmaster of Los Angeles from enforcing an order thereunder, was entered on August 1, 1969 (App. 41). A notice of appeal was filed on Tuesday, September 2, 1969, Monday, September 1 having been Labor Day.

The judgment of the three-judge district court in *The Book Bin*, dismissing the action brought by the United States for an order pursuant to 39 U.S.C. 4007, enjoining the Postmaster General from conducting proceedings pursuant to 39 U.S.C. 4006, and declaring 39 U.S.C. 4006 and 4007 unconstitutional, was entered on October 16, 1969 (App. 106). A notice of appeal was filed that day.

The jurisdiction of this Court over both appeals is conferred by 28 U.S.C. 1252 and 1253. *Zemel* v. *Rusk*, 381 U.S. 1.

On March 2, 1970, the Court noted probable jurisdiction in both cases and set them for consecutive argument (397 U.S. 959, 960).

STATUTES INVOLVED

39 U.S.C. § 4006 provides as follows:

Upon evidence satisfactory to the Postmaster General that a person is obtaining or attempting to obtain remittances of money or property of any kind through the mail for an obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, or is depositing or causing to be deposited in the United States mail information as to where, how, or from whom the same may be obtained, the Postmaster General may—

(1) direct postmasters at the office at which registered letters or other letters or mail arrive, addressed to such a person or to his representative, to return the registered letters or other letters or mail to the sender marked "Unlawful"; and

(2) forbid the payment by a postmaster to such a person or his representative of any money order or postal note drawn to the order of either and provide for the return to the remitters of the sums named in the money orders or postal notes.

39 U.S.C. § 4007 provides as follows:

(a) In preparation for or during the pendency of proceedings under sections 4005 and 4006 of this title, the United States district court in the district in which the defendant receives his mail shall, upon application therefor by the Postmaster General and upon a showing of probable cause to believe the statute is being violated, enter a temporary restraining order and preliminary injunction pursuant to rule 65 of the Federal Rules of Civil Procedure directing the detention of the defendant's incom-

ing mail by the postmaster pending the conclusion of the statutory proceedings and any appeal therefrom. The district court may provide in the order that the detained mail be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity. An action taken by a court hereunder does not affect or determine any fact at issue in the statutory proceedings.

(b) This section does not apply to mail addressed to publishers of publications which have entry as second class matter, or to mail addressed to the agents of those publishers.

QUESTIONS PRESENTED

1. Whether 39 U.S.C. 4006 is unconstitutional on its face.

2. Whether 39 U.S.C. 4007 is unconstitutional when invoked in aid of proceedings for the enforcement of 39 U.S.C. 4006.

STATEMENT

The Mail Box and The Book Bin are retail distributors of magazines which use the United States mails to advertise their magazines, to receive orders and payment for them, and to distribute them. The General Counsel of the Post Office Department concluded that certain of these magazines—picture magazines consisting entirely or almost entirely of photographs of women exposing their genitalia—are obscene. He therefore sought to invoke the remedies of 39 U.S.C. 4006 and 4007 to halt further use of the mails and of postal money orders for commerce in these magazines.

A. THE STATUTORY BACKGROUND

1. SECTION 4006

Section 4006 was enacted in 1950, in response to the substantial increase in the flow of lewd and obscene materials through the mails which the United States had experienced since World War II. S. Rep. No. 2179, 81st Cong., 2d Sess. (1950). The section was modelled on 39 U.S.C. 4005, an anti-fraud statute which had been in force since 1890, and whose constitutionality had repeatedly been upheld. *Id.* at 3; 26 Stat. 466; *Public Clearing House* v. *Coyne,* 194 U.S. 497; *Donaldson* v. *Read Magazine,* 333 U.S. 178.

Section 4005, as amended (82 Stat. 1153), grants the Postmaster General authority to stamp appropriately and return to the sender any mail sent to the perpetrator of what he finds to be a scheme for obtaining money by means of false representations, in connection with that scheme. The Postmaster General may also refuse to cash postal money orders drawn to the actor in connection with his scheme.

Section 4006 grants identical authority with respect to mail and postal money orders addressed to persons the Postmaster General finds to have been using the mails for the advertisement, sale and distribution of "obscene" matter. That is, it permits him to stamp as "unlawful" and return to the senders letters addressed to any person, and to prohibit the payment of postal money orders to that person, if he finds, on "evidence satisfactory to [him]," that the person is obtaining or seeking money through the mails for "an obscene, lewd, lascivious, indecent, filthy, or vile article, matter,

thing, device or substance" or is using the mail to distribute information about how such items may be obtained.

Proceedings under both Section 4005 and Section 4006 are governed by a single set of departmental regulations, which comply with the Administrative Procedure Act. Under them, a proceeding is begun with a written complaint and notice of hearing initiated by the General Counsel of the Post Office Department. 39 C.F.R. §§ 952.5, 952.7, 952.8. There is a trial-type hearing before an impartial hearing examiner, who renders a full opinion, including findings of fact, conclusions of law and a statement of reasons. 39 C.F.R. §§ 952.9–952.25; see also 39 U.S.C. 308a; 39 C.F.R. § 821.3(c)(1). The constitutional definition of obscenity is applied in these proceedings.[1] Provision is made for a full and precise record. 39 C.F.R. 952.18–952.22. The decision is to "be rendered with all due speed," 39 C.F.R. § 952.24(a), and there is an administrative appeal. 39 C.F.R. § 952.25. An order does not take effect until the administrative proceeding has been completed, but the Postmaster General is not required to seek judicial enforcement. 39 C.F.R. § 952.28.

Where a Section 4006 (or 4005) order is entered, it applies only to mail and postal money orders directly related to the unlawful (fraudulent) activity. Mail

[1] See, for example, the opinion of the Department's judicial officer in the Section 4006 administrative proceeding involving *The Mail Box*, set out in the Appendix to this Brief at pp. 44–63 *infra*.

which appears from its cover to be unrelated to that activity, such as second class publications and utility bills, is immediately delivered. Because the privacy of first class mail is guaranteed, 39 U.S.C. 4057, 39 C.F.R. 117, *United States* v. *Van Leeuwen,* 397 U.S. 249, other mail cannot be opened by postal officials to determine its contents. Therefore, such mail as, from its appearance, might be related to the unlawful activity is held at the postal station for at least 24 hours after its arrival. During this time it may be opened and inspected by the addressee or his agent. Mail containing matter found unrelated to the unlawful activities is then delivered; mail not thus inspected, or which is found upon inspection to be related to the unlawful activity, is stamped "unlawful" and returned to the sender.[8]

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[8] The order initially entered against The Mail Box in the administrative proceedings against it, App., *infra*, pp. 63–66, seemed to require "unlawful" treatment for all mail containing payments for its publications or requesting that those publications be sent, whether or not the publications sought were among those which had been adjudicated obscene. Such a broad order would be counter to Post Office policy, which is to limit Section 4006 orders to adjudicated publications, to transmit requests for other publications and to cash postal money orders in payment for other publications. This policy is shown, *inter alia*, by the limited orders secured from the district court in the Section 4007 proceedings for interim relief against The Mail Box; those orders do specify the particular magazines as to which mail is not to be transmitted, and permit transmittal of all other mail. App., *infra*, *pp.* 41–44. Since the Postmaster to whom the Section 4006 administrative order was sent was the same as had previously been administering the district court's order granting interim relief, the Section 4006 order in practice would have been understood as embodying the same limitations. To eliminate any doubt as to its in-

2. SECTION 4007

Experience proved, however, that such administrative orders were often inadequate. The bulk of mail activity in a pornography distribution scheme often occurs, and its profits are often reaped, within a short time after the scheme is launched. S. Rep. No. 1818, 86th Cong., 2d Sess. (1960). Despite the emphasis on expedition in the administrative regulations, *e.g.*, 39 C.F.R. 952.7, 952.13, 952.24(a), the proceedings can take so long that distribution is essentially complete by the time an administrative order can be entered. Accordingly, in 1956, Congress authorized the Postmaster General to detain a sender's mail for periods of up to twenty days, pending the outcome of Section 4006 proceedings against him; upon application to a district court within the twenty-day period and upon a showing that continued detention of mail was both "reasonable and necessary" to enforcement of Section 4006 (then 39 U.S.C. (1958 ed.) 259a), the period of mail detention could be extended for the pendency of the proceedings. 70 Stat. 699. See *Toberoff* v. *Summerfield,* 245 F. 2d 360 (C.A. 9); 256 F. 2d 91 (C.A. 9).

Section 4007 in its present form was enacted in 1960, when Congress concluded that the twenty-day period, even with the opportunity for judicial extension, was too short in relation to the length of the administrative proceedings; and that the question of

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tended scope, however, the Section 4006 order has since been modified by the Post Office to make these limitations explicit on its face. App., *infra*, pp. 67–71. Compare *Donaldson* v. *Read Magazine, Inc.*, 333 U.S. 178, 183–184.

preliminary restraint should be entirely in judicial hands. Accordingly, Section 4007 (1) withdraws from postal officials all powers of temporary mail detention; (2) permits district courts to order such detention pending completion of administrative proceedings and any appeal, upon a showing of probable cause to believe that Section 4005 or 4006 is being violated; (3) requires the district court proceedings to meet the procedures and standards employed for the issuance of temporary retaining orders and preliminary injunctions under Rule 65 of the Federal Rules of Civil Procedure; (4) authorizes the district court to provide in its order that the detained mail "be open to examination by the defendant and such mail be delivered as is clearly not connected with the alleged unlawful activity"; and (5) provides that the action of the court "does not affect or determine any fact at issue in the statutory proceedings." The respondent continues to receive his mail while proceedings under either Section 4006 or Section 4005 are in progress unless application is made for, and the court issues, an order under Section 4007.

B. THE PROCEEDINGS BELOW

In *The Mail Box,* the Postmaster General successfully moved for a temporary detention order under Section 4007 in the United States District Court or the Central District of California regarding mail orders for certain appellee's magazines; a temporary restraining order was granted on December 3, 1968, and a preliminary injunction on December 26, 1968. (App. *infra,* pp. 41–44.) Administrative proceedings

under Section 4006 were begun at the same time. On December 31, 1968, following an administrative hearing, the Judicial Officer of the Department found that the specified magazines—all of the character previously stated—were obscene; the finding was based upon a detailed analysis of the three independent elements of obscenity necessary to command a majority of this Court. See the Appendix, *infra*, at pp. 49–61. An appropriate order was then entered, *id.* at 63–66; see n. 2 *supra*, and appellee sued to enjoin its enforcement. A three-judge district court was convened and, in a brief *per curiam* opinion, found the statute unconstitutional on its face solely "because it fails to meet the requirements of *Freedman* v. *Maryland* (1965), 380 U.S. 51" — presumably in that "[t]he burden of seeking judicial review of the Postmaster General's decision is placed on the person against whom the mail block has been imposed" (J.S. 16). Enforcement of Section 4006 was enjoined.

In *The Book Bin*, appellee counterclaimed to the Postmaster General's action to obtain a Section 4007 order,[3] filed in the United States District Court for the Northern District of Georgia, by asserting that both that section and Section 4006 are unconstitutional and requesting injunctive relief against their enforcement. A three judge district court was convened—in this case, before any administrative proceedings could be completed—and held both sections unconstitutional (App. 21). Regarding Section 4007,

[3] The order was sought with respect to a single issue of one of appellee's magazines, which, again, was of the character described above.

the court concluded that the finding merely of "probable cause" to believe an item was obscene could not justify even a temporary mail detention order; and that, in any event, under *Lamont* v. *Postmaster General*, 381 U.S. 301, the scope of the mail detention order is too broad and the burden on the addressees to secure delivery of mail unconnected with the unlawful activity, too great. It agreed with the district court in *The Mail Box* that the procedures of Section 4006 do not meet the requirements of the *Freedman* case.

SUMMARY OF ARGUMENT

I

The postal power conferred on Congress by the Constitution gives it full authority, short of restrictions imposed by the First Amendment, to deny the use of mails to commercial traffic in obscenity. See *United States* v. *Hiett*, 415 F.2d 664 (C.A. 5), certiorari denied, 397 U.S. 936. Indeed, this Court has upheld against sweeping First Amendment attack a statute parallel to that at issue here, regulating the use of the mails for transmission of fraudulent and lottery matter. 39 U.S.C. (Supp. V) 4005; *Donaldson* v. *Read Magazine*, 333 U.S. 178. It found not "the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of press include complete freedom, uncontrollable by Congress, to use the mails for perpetration of swindling schemes." 333 U.S. at 191. Similarly, the First Amendment does not confer complete freedom, uncontrollable by Congress, to use the mails for commerce in pornography.

Stanley v. *Georgia,* 394 U.S. 557, requires no different conclusion. *Stanley* does not protect commercial activity, even where it occurs in relative privacy, among adults, and without causing alarm to the community as a whole by involving unwilling persons. That opinion protects privacy, and in particular the privacy of ideas; it does not follow that an individual has any "right to receive" obscene materials, which by this Court's definition embody no redeeming advocacy of ideas. A commercial pornographer is no more entitled by *Stanley* to receive his mail unimpeded than he would be to protect himself from otherwise lawful searches and seizures of his place of business by using his home for that purpose.

II

Like the fraud statute upheld in *Donaldson, supra,* Section 4006 meets all necessary constitutional standards. First, it is entirely different from the motion picture censorship statute involved in *Freedman* v. *Maryland,* 380 U.S. 51. Section 4006 embodies no requirement that materials must be submitted for approval before they can be published; the burden is entirely upon the government to act, and to prove that materials are objectionable before their distribution can be interfered with. Under Section 4006, administrative proceedings take place before an impartial judicial officer, not a censorial board, and in full compliance with the ordinary rules of administrative due process. The administrative order does not go into effect until a conclusion is reached that the challenged material is in fact obscene; and, as we view the statute,

if an appeal is taken, mail subject to the order may be impounded, but may not be returned to the sender pending resolution of that appeal. Indeed, a still more restrictive interpretation is possible if the above does not suffice to defeat the constitutional challenge to the statute: the administrative order could be denied any effect whatever, if an appeal were taken, until the completion of review. In these circumstances it is impossible to say that the slight burden on the publisher to initiate the review process works any deprivation of his constitutional rights. Cf. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 690, n. 22.

Second, a Section 4006 order is not invalid under *Lamont* v. *Postmaster General*, 381 U.S. 301. The inspection procedure for which it provides is necessary, in view of the guaranteed privacy of first class mail from *in camera* postal inspection; the statute thus provides as narrow a remedy as the situation permits. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 503. That remedy was upheld in *Donaldson, supra*, where this Court noted that the scope of orders can frequently be tailored to the circumstances of a particular case in such a way as to minimize its possible adverse effect upon the publisher's legitimate postal business. Unlike the situation in *Lamont*, the mailer here is not an innocent party whom Congress presumed to protect by imposing a disagreeable and unconstitutional burden of action. He is the very person whose mailing activities (which, it must be stressed, are found to be of a nature forbidden altogether) have given rise to the proceedings; and he has the benefit

of adversary administrative proceedings in which the government has the burden of going forward and of proof.

Since Section 4006, like a criminal statute, applies only after publication has occurred, it has no impermissible chilling effects. Like a criminal statute, it is intended to induce self-censorship in those disposed to violate it; but so long as the activating circumstances are described with sufficient precision—as they are—there can be no more objection to this effect than there is in the case of a criminal statute. *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 442.

III

The preliminary relief permitted by Section 4007 also meets all necessary constitutional standards. This section permits interim relief, in both obscenity and fraud-lottery cases, only under those circumstances where such relief would be justified under Fed. R. Civ. P. 65. This means that, to secure such relief in a Section 4006 case, the Post Office must show in an adversary hearing both that there is probable cause to believe that the materials at issue are obscene, and that emergency relief is essential if the public policy of the statute is not to be defeated.

Since such relief could be sought only if the government had sufficient information with which to give notice of the proceedings, a motion for Section 4007 relief could never be *ex parte.* Moreover, under this Court's cases, any finding of probable cause could

be made only after judicial inspection of the materials themselves. Given this Court's present approach to the issue of obscenity, *Redrup* v. *New York*, 386 U.S. 767, it would be the rare case in which a court could conclude that there was probable cause to believe materials to be obscene which were not of that character.

Moreover, the clear implication of Section 4007's legislative history is that that section is to be invoked only where emergency relief is truly needed—where the major part of the distribution will occur before administrative proceedings can be concluded (effectively defeating any orders that may eventually be entered) and which involve enterprises of substantial size. Under Rule 65, the court is permitted to weigh against the government's interest the inconvenience and harm to the respondent. Indeed, if the administrative proceedings are delayed, that in itself would warrant modification or remission of a Section 4007 order.

In short, while Section 4007 speaks of probable cause, in practice judicial scrutiny will go much beyond that; the proceeding takes place in the expeditious but scrupulous framework of Rule 65; and the traditional flexibility of courts of equity is available to balance conveniences, mitigate hardships and frame appropriately limited orders, subject to modification with changing conditions, and to appellate review if that need be.

ARGUMENT

I. CONGRESS HAS CONSTITUTIONAL AUTHORITY, BY AN APPROPRIATELY LIMITED STATUTE, TO DENY THE USE OF THE MAILS TO COMMERCIAL TRAFFICKERS IN PORNOGRAPHY FOR THE RECEIPT OF PAYMENTS AND ORDERS FOR OBSCENE MATERIALS

Congress' constitutional power to "Establish Post Offices and post roads" and to "regulate Commerce with foreign Nations, and among the several States," Art. I, Section 8, includes full power to deny the use of the mails to commercial traffic in obscenity. Short of restrictions imposed by the First Amendment, its right to prohibit the carriage of unlawful or dangerous items, or the carrying on of an unlawful business through the mails is not open to doubt. *United States* v. *Hiett,* 415 F. 2d 664, 666–669 (C.A. 5), certiorari denied, 397 U.S. 936. Some items are prohibited because of their inherent dangerousness, including danger to the carriage of the mails themselves, *e.g.,* 18 U.S.C. 1716; others, because of the unlawfulness of the transmission, and a desire to protect the postal service from involvement, however innocent, in such sendings. 18 U.S.C. 1302, 1341, 1717, 1718; 39 U.S.C. 4001. The Post Office Department is not only a common carrier, but also an instrumentality of government. As such, it is peculiarly affected with a public interest; within the limits imposed by the Bill of Rights, and especially the First Amendment, it is important and proper to protect that interest from involvement, even unknowing, with crime.

These propositions were reaffirmed in a case involving a statute parallel to the obscenity statute at issue

here, but in that case regulating the use of the mails for transmission of fraudulent and lottery matter. Federal criminal statutes make it an offense to use the mails in connection with a lottery or a fraudulent scheme. 18 U.S.C. 1302, 1341. When the Postmaster General is persuaded that a person is using the mails for such a scheme, however, he may also invoke the civil remedy of 39 U.S.C. (Supp. V) 4005, permitting the return to their senders of letters addressed to that person or his representative, with the letters appropriately stamped to indicate the reason for their return. In 1945, he invoked that remedy against Facts Magazine and others on account of an allegedly fraudulent "puzzle contest" appearing in that magazine, and this Court upheld him. *Donaldson* v. *Read Magazine,* 333 U.S. 178.

Although the publishers of Facts Magazine mounted a broadscale constitutional attack on Section 4005 and its application to them—including, *inter alia,* First Amendment claims, 333 U.S. at 189, 191—the Court found the government's power to protect its citizens against use of the mails to perpetrate fraud to be firmly established, and sufficient to support the statute. The Court appears to have accepted the publishers' contention, as we do here, that Congress' power of regulation over postal matters, as over commerce and tax, is limited by the strictures of the Bill of Rights; but those limitations do not "provide the slightest support for a contention that the constitutional guarantees of freedom of speech and freedom of the press include complete freedom, uncontrollable by Congress, to

use the mails for perpetration of swindling schemes," 333 U.S. at 191; and see *Hiett, supra,* 415 F. 2d at 667.

Similarly, we believe the First Amendment does not confer on individuals complete freedom, uncontrollable by Congress, to use the mails for commerce in pornography. As in the case of fraud, such use may be prohibited by criminal statute. Compare 18 U.S.C. 1341 with 18 U.S.C. 1461; *Parr* v. *United States,* 363 U.S. 370, with *Roth* v. *United States,* 354 U.S. 476. And assuming—as in the case of fraud—that requisite constitutional limitations are honored, the use may also be regulated by civil means. Since civil interdiction of mail to a person engaged in fraud meets the constitutional tests, it would appear that civil interdiction of mail to a commercial salesman of obscenity would do so as well. See *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 441.

It may be argued, however, that this Court's recent decision in *Stanley* v. *Georgia,* 394 U.S. 557, requires an opposite conclusion. Although the opinion in that case limited itself in terms to a holding that the state has no power to make criminal the mere possession of obscene literature in a private home, and expressly disavowed any intent to limit the *Roth* doctrine, 394 U.S. at 565, 568, some lower courts have read it as protecting commercial activity, particularly where that activity occurs in relative privacy, among adults, and without causing alarm to the community as a whole by involving unwilling persons. See, *e.g., Byrne* v. *Karalexis,* set for reargument, No. 83, this Term; *United States* v. *Thirty-Seven Photographs,* pending on jurisdictional statement, No. 133, this Term. If *Stanley* does

protect such activity, then it might appear that use of the mails—inherently private and, in the case of a mailed order blank, ordinarily consensual[4]—is indeed protected from government regulation. On that reasoning, only the uninvited advertisement or mailing of obscene matter to a minor could be made an offense, and *Roth* would have been not only limited but overruled.

We believe *Stanley* has no such reach. As we explain at greater length in our brief *Amicus Curiae* in *Byrne* v. *Karalexis, supra,* pp. 6–17, Stanley's disclaimer of any purpose to modify *Roth* in its application to the commercial distribution of pornography can and should be honored. *Stanley* recognized that, for important and compelling reasons, the state has no right to intrude into a private home in search of obscenity. That the owner of those places has a constitutional right against intrusion into them does not mean, however, that he has a First Amendment right, as such, to have everything which might otherwise be found there. The First Amendment protects materials otherwise obscene in such circumstances because of the risks to privacy, to protected speech and thought, which would be presented by a governmental search. It does not follow that an individual has a "right to receive" obscene materials. It therefore cannot be argued, we submit, that there is any First Amendment right to disseminate such materials.

Nor do we think the use of the mails in this kind of case can fairly be analogized to the use of a home

[4] It is possible that, for a prank or to create distress, an order would be placed in another's name.

or office as a private sanctuary from state inquiry. It is true that, like the home, first class mail is protected from unreasonable searches and seizures. 39 U.S.C. 4057; cf. *United States* v. *Van Leeuwen*, 397 U.S. 249. Accordingly, it is possible that consensual, non-commercial correspondence sent through the mails would be found to enjoy immunity under *Stanley* from seizure or use as the basis for prosecution; as this Court knows, the government's policy is not to prosecute such cases. *Redmond* v. *United States*, 384 U.S. 264; and see the Memorandum for the United States therein, No. 1056, O.T. 1965, pp. 3–4. But here, the mails are being used for a commercial purpose, and that degree of concern for the privacy of ideas is no longer appropriate. Just as a home used as a place of business by a dealer in pornography would not be immune from search under *Stanley*, use of the mails for commercial purposes in connection with dealings in obscenity is subject to regulation without any offense to the *Stanley* holding.

II. SECTION 4006, LIKE THE FRAUD STATUTE UPHELD IN *DONALDSON* V. *READ MAGAZINE*, 333 U.S. 178, MEETS ALL NECESSARY CONSTITUTIONAL STANDARDS.

A. SECTION 4006 MEETS THE STANDARDS REQUIRED BY *FREEDMAN* V. *MARYLAND*, 380 U.S. 51.

1. The principal holding in the courts below was that Section 4006 fails to provide adequately for a prompt judicial resolution of the question of obscenity, and thus does not meet the standard for civil obscenity proceedings set by this Court in *Freedman* v. *Maryland*, 380 U.S. 51. *Freedman* involved a movie censorship scheme which forbade the exhibition of any

moving picture in the state until it had been submitted to, and approved by, a state board of censors. The scheme made no special provision for expedition in resolving this issue before the board; if it denied a license, that effectively barred the film from exhibition; and there was no assurance of prompt judicial review. These circumstances led the Court to conclude the Maryland statute was unconstitutional. By placing the burden of action on the exhibitor throughout, it created the risk that the decision of a body whose "business is to censor," *id.* at 57, might become final; by requiring exhibitors to invoke "unduly cumbersome and time-consuming procedures before they may exercise their constitutional right of expression," *Shuttlesworth* v. *Birmingham,* 394 U.S. 147, 162 (Harlan, J., concurring), the statute created real risks that protected speech would be foregone. 380 U.S. at 59. The nub of the opinion, then, was the length of time during which publication or exhibition would be forbidden pending the completion of administrative and judicial review; if not adequately controlled, the Court held, the mere prospect of delay before publication could be permitted was sufficient to impair First Amendment rights. 380 U.S. at 58–61; *Dombrowski* v. *Pfister,* 380 U.S. 479, 489; *Teitel Film Corp.* v. *Cusack,* 390 U.S. 139, 141–142.

On all of these matters, the procedures under Section 4006 differ substantially from those invalidated in *Freedman.*[8]

[8] Section 4006 itself is silent on the procedures by which the character of the offending material is to be determined. The statute was not, however, drafted as a matter of legislative first impression. Its language was taken, with minor changes

First, there is no issue of prior censorship or restraint of publication; the Post Office is not placed in the position of overseeing the general flow of the mail. The publishers here began to sell the issues involved as soon as they had produced them, and without any need to submit them to the Post Office for clearance. When questionable publications come to the Post Office's attention, the burden is on it to initiate administrative proceedings and—unless it can persuade a district court to grant temporary relief under Section 4007, discussed *infra*—the publisher continues to receive requests for his materials and payments for them unimpeded throughout the pendency of the administrative proceedings. Those proceedings are held before an impartial judicial officer or hearing examiner,[6] not a body selected for its interest in excising

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in phraseology, from statutes first enacted nearly a century ago to prevent the use of the mails for the perpetration of frauds, the promotion of lotteries and the conduct of unlawful businesses under fictitious names. Act of June 8, 1872, ch. 335, § 300, 17 Stat. 322; Act of March 2, 1889, ch. 393, § 3, 25 Stat. 873 (now 39 U.S.C. 4003, 4005). Although phrased in language seeming to give the Postmaster General wide discretion in determining how to carry out his statutory power, these acts have been implemented historically by procedures embodying contemporary conceptions of fairness and procedural due process. *Plapao Laboratories, Inc.* v. *Farley*, 92 F. 2d 228 (C.A. D.C.); *New* v. *Tribond Sales Corp.*, 19 F. 2d 671 (C.A. D.C.) The Administrative Procedure Act, moreover, applies to proceedings conducted pursuant to these statutes. 5 U.S.C. (Supp. V) 559; *Cates* v. *Haderlein*, 342 U.S. 804, *reversing per curiam*, 189 F. 2d 369 (C.A. 7); *Door* v. *Donaldson*, 195 F. 2d 764 (C.A. D.C.); Cf. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33.

[6] The judicial officer and hearing examiners have a number of other duties in addition to obscenity matters. 39 C.F.R. 821.3(c); 1969 Annual Report of the Postmaster General 296.

controversy from communication, in full accordance with the requirements of administrative due process. The officer must be persuaded that the matter in question is affirmatively obscene, under this Court's standards, before any administrative action can be taken, see *Kirby* v. *Shaw*, 358 F.2d 446 (C.A. 9); the applicable regulations require him to produce a record that is full and precise, 39 C.F.R. 952.18–952.22, and an exposition of his reasoning as full as would result from a trial in district court. 39 C.F.R. 952.24.

In the absence of the spectre of censorship, *Freedman* does not preclude the initial determination of obscenity from being made by an administrative official.[1] While *Freedman* spoke very broadly of the

[1] To forbid such determinations would raise grave doubts about the administrative process in many areas. It might, for example, disqualify the Federal Communications Commission from making determinations involving First Amendment rights in broadcasting, and the National Labor Relations Board in picketing. There is no evidence that administrative agencies in general are not competent to decide such questions, at least in the first instance. The opinion of the Judicial Officer in the *Book Bin* case (App., infra, pp. 44–61) displays considerable sensitivity to questions of freedom of expression. It is significant that of the four cases cited in *Freedman* as teaching the need for judicial action only one, *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, involved an adversary administrative proceeding, and in that case there was no opinion for the Court. Two others, *A Quantity of Books* v. *Kansas*, 378 U.S. 205, and *Marcus* v. *Search Warrant*, 367 U.S. 717, involved the seizure of allegedly obscene books on the authority of warrants issued *ex parte* by state court judges. In the remaining case the vice of the state scheme was that no proceeding of any kind was involved. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58. Taken together these authorities go further to establish the proposition that an adversary hearing is required than that the hearing in the first instance must be before a judge.

need for a prompt judicial determination of the issue of obscenity as an integral part of any non-criminal scheme of limitation on expression, that language appeared in response to a situation where the alternative to a judicial determination was not a quasi-judicial adversary proceeding, but unilateral administrative action—in which the full weight of administrative inertia lay against the private party. Only after the *Freedman* board had made its decision, *ex parte*, could there be any sort of formal proceeding, and in that proceeding the exhibitor carried the full burden of action and persuasion.

It is true that, in the absence of an attempt to obtain judicial review, a Section 4006 order may take effect immediately, so that the burden of seeking review is on the person subject to the order. While the existence of the order and the corresponding interference with mail sales undoubtedly hinder his publication, however, the order—again unlike *Freedman*—does not foreclose publication. He remains free to sell by other means. Indeed, if judicial review *is* sought, we believe that the necessary implication of the statutory scheme is that those sales are merely postponed, not foreclosed, pending judicial resolution of the case.

Thus, if the Department had been able to obtain interim judicial relief under Section 4007, that would have provided only for the impounding of incoming remittances and purchase orders, and not for their return as "unlawful", during the pendency of the administrative proceedings "and any appeal therefrom"; if the publisher prevailed in such proceedings,

he would then be entitled to receive that mail. Where such relief is not obtained, but an appeal is taken from an administrative order under Section 4006, that order cannot have any greater effect. At most, during the pendency of an appeal, it would authorize the impounding of incoming matter on the same terms as would a judicial order under Section 4007. Cf. *Donaldson* v. *Read Magazine, supra,* 333 U.S. at 186. While inconvenient to a publisher who ultimately prevails on appeal, such an interim effect would be fully justified by administrative findings of obscenity in proceedings of the type described, and does not approach the effect of the procedures found improper in *Freedman* and *Teitel Film.*

In particular, the procedures under this statute provide an incentive, not a disincentive, to seeking review, and thus avoid this Court's concern in *Freedman* that the effect of the procedures there might be to discourage review and leave the matter in the hands of a censor. Since an appeal will preserve the mail involved for possible future delivery, any publisher believing his publication to be protected would have a strong motive for appealing. Correspondingly, delay here is a much less pressing element. While his remitters might become discouraged after a time of no response, a publisher could explain the reason for delay to them if he ultimately prevailed, and thus retain their business. And, since a *national* statute is at issue, only one proceeding will be required to clear the publication for distribution. In these circumstances, the publisher's burden on initiating judicial review is not so

serious as to condemn the statute under the First Amendment.

Finally, Section 4006 is not invalid under *Freedman* because the publisher must carry a burden of persuasion on judicial review. While review would be on the administrative record, that record must be full and precise. 39 C.F.R. 952.18–952.22. The reviewing court would have the same freedom and responsibility as this Court traditionally exercises in obscenity cases to review for itself the materials in question and to determine whether they are obscene. *E.g., Redrup* v. *New York,* 386 U.S. 767; *Jacobellis* v. *Ohio,* 378 U.S. 184. The legal question is no different than would obtain if the Post Office were seeking enforcement of its order; although the publisher initiates the appeal, the court must conclude that the material is obscene before it can enforce the Department's order. In this circumstance, it is improper to say that any burden of persuasion has been placed on the publisher. Cf. *Interstate Circuit* v. *Dallas,* 390 U.S. 676, 690, n. 22.

2. Although we believe this analysis suffices to demonstrate the constitutionality of the statute under *Freedman,* especially in view of the absence of elements of licensing or censorship, see *Kingsley Books, supra,* 354 U.S. at 441, the Court might conclude that questions remain regarding the fact and timing of judicial involvement in its enforcement. If so, a further limiting construction might be adopted which would meet these doubts and thus avoid invalidating the entire scheme. That construction would treat an appeal from a Section 4006 administrative order as staying it in its entirety until resolution of the ap-

peal; in the interim, unless there was a judicial order for temporary detention of mail under Section 4007, the publisher would receive his mail unimpeded.

The key to this alternative construction is the judicial order under Section 4007, the validity of which is separately discussed *infra* at pp. 33–38. While one might believe that denying all effect to the administrative order pending appeal would substantially undercut the statute by permitting publishers to collect their profits during the first few profitable weeks of a press run, see S. Rep. No. 1818, 86th Cong., 2d Sess. (1960) 2, the availability of interim judicial relief answers that objection where success in judicial proceedings is likely; where success is not likely, the objection has little force. Indeed, in enacting what is now Section 4007 in 1960, the Congress considered but rejected a request by the Postmaster General to make clear that appeal proceedings would *not* operate as a stay of a Section 4006 order in cases where interim judicial intervention under Section 4007 either had not been sought or had been denied. S. Rep. No. 1818, *supra,* at 5. Section 4007 authorizes an order of temporary detention to be in effect "pending the conclusion of the statutory proceedings *and any appeal therefrom*" (emphasis supplied). On the floor of the Senate, its sponsor stressed that "The bill places the responsibility for the detention of mail upon the courts instead of on an appointive officer," 106 Cong. Rec. 15428 (1960), and expressed a general desire to create a statutory procedure which would meet constitutional requirements while permitting effective regulation of use of the mails for commercial dealings in pornography. In

these circumstances, and to avoid constitutional doubts, it would be appropriate to treat an appeal of a Section 4006 order as automatically staying its effect, where there was no Section 4007 judicial order for temporary detention of mail.

Under such a rule, the burden on a mailer to take the initiative of filing an appeal from the administrative order is so slight that it could not invalidate the statutory scheme on First Amendment grounds. Cf. *Interstate Circuit* v. *Dallas,* supra, 390 U.S. at n. 22. There is practical assurance that the administrative action will have no effect until it has received judicial endorsement. Unlike *Freeman,* where the movie could not be shown until the censor's approval had been obtained or an appeal won, here the publisher would remain free to distribute his work throughout, and would be assured of continuing to receive mail orders and payments until a mail block had been judicially ordered.

B. A SECTION 4006 ORDER IS PROPER UNDER THIS COURT'S DECISION IN *LAMONT* v. *POSTMASTER GENERAL,* 381 U.S. 103

The form of order entered at the conclusion of a Section 4006 proceeding is substantially identical to that which this Court approved for Section 4005 proceedings in *Donaldson* v. *Read Magazine, supra.* It states the findings made by the Department's judicial officer, and directs the appropriate postmaster to withhold certain mail bearing a stated form of address. Mail which it is clear from its wrapper is not connected with the adjudicated matter is not withheld; that which is withheld is retained in the post office

for at least twenty-four hours, where it is available for inspection by the addressee or his agent. Mail which on inspection is found not to be connected with the adjudicated matter is delivered to the addressee; uninspected mail or mail found to be connected with the adjudicated matter is stamped appropriately, to indicate the reason for its return, and returned to the sender or (if no return address is given) treated as dead letter mail.[8]

This procedure for inspection by addressees is required by 39 U.S.C. 4057, which protects all first class mail from inspection by postal inspectors in the absence of special circumstances not present here. To the extent that a first class letter does not show on its face whether it is connected with the adjudicated materials, there is no other way to identify it. As in *Donaldson,* the order may be restricted to certain kinds of addresses, such as commercial names, most likely to be connected with the materials, and thus minimize the risk of interfering with private correspondence. And while the inspection procedure undoubtedly imposes burdens on the respondent, there is no other means of discriminating more finely among types of

[8] Similarly, postal money orders sent in connection with the false representations, lottery, or adjudicated materials will not be cashed, but any money order which the recipient can show was received in another connection will be cashed. Apart from the mail stop, this aspect of Section 4005–4006 orders is no longer of substantial practical significance, since, contrary to earlier practice, postal money orders may now be redeemed at *any* post office; the office of redemption no longer need be specified. It is impractical to enforce a stop-payment order of the Section 4006 type on such a broad scale.

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material, while still protecting the privacy of sealed correspondence from *in camera* inspection by government officials. Thus, the order is drawn as narrowly as the situation permits, in accord with the spirit of this Court's admonition that each method of dissemination presents "its own peculiar problems" and lends itself to different techniques of regulation. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 503. See also *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 386–87; *Times Film Co.* v. *City of Chicago,* 369 U.S. 43, 49; and see n. 2 *supra.*

Such considerations underlay the rejection in *Donaldson* of the contention that Section 4005, authorizing identical mail block orders in lottery and fraud cases, was overbroad. There, a broad mail block order had been entered initially, and respondents attacked it in part for the reason relied on below—that it would hinder their receipt of mail the government had no right to interfere with. Pending reargument after this Court had invited discussion of the breadth of the order, the Postmaster General modified the scope of the order to block only those letters most likely, from the form of address used, to be in response to the fraudulent scheme. The Court approved the modification, 333 U.S. at 182–185, and then rejected a sweeping constitutional attack on the statute. *Id.* at 189–192. It was evidently of the opinion, correct in our view, that any objectionable overbreadth in the mail block order would reflect an infirmity, not in the statute, but in the order. The possibility that a particular order may be overbroad is insufficient to sup-

port the judgment that Sections 4006 is unconstitutional on its face.

Lamont v. *Postmaster General,* 381 U.S. 301, is not to the contrary. *Lamont* involved mailing activities which were lawful. The trafficking in obscenity is not. Mr. Lamont, the addressee denied the delivery of mail, was the putative "beneficiary" of the statutory scheme to which he objected. Congress ostensibly meant to protect him, as addressee, from mail which, because of its source and content, he was presumed not to want. Under Section 4006, however, the dealer whose mail is withheld is clearly not an innocent party whose actual wishes simply differ from the presumption made by the statute. He is the very person whose mailing activities (which, it must be stressed, are found to be of a nature forbidden altogether) have given rise to the proceedings. Unlike the plaintiff in *Lamont,* he has the protection of an adversary proceeding and appellate review. In this proceeding, initiated by the government, the burden is unequivocally upon the government to show that reasons exist for bringing him within the particularized ambit of the statute; if the government fails, the dealer receives his mail in normal fashion. In *Lamont,* in contrast, all persons were indiscriminately brought within the sweep of the statute, and could free themselves of its restriction only by action which this Court held to be violative of their First Amendment rights.

Finally, in *Lamont,* the addressee who requested delivery of the material had to bear the stigma of stating on an official form that he wished to receive

documents the government had classified as "communist political propaganda." In that requirement, the Court found "a deterrent effect," for "any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" 381 U.S. at 307. No comparable stigma is imposed by the requirement that an addressee inspect his mail to claim those items which are unrelated to unlawful transactions.

C. SECTION 4006 DOES NOT OTHERWISE CHILL OR INHIBIT THE EXERCISE OF FIRST AMENDMENT RIGHTS

The possibility that a Section 4006 order will be entered regarding particular publications does not impermissibly chill or inhibit the exercise of First Amendment rights. If its procedures are not improperly vague, and otherwise satisfy the Constitution's demands, its enforcement could not be blocked simply because persons subject to it feared its use. The logic of such an argument would equally foreclose criminal prosecution for sale of obscene matter. Some degree of self-censorship results from *any* law imposing sanctions on the mailing of obscenity. The point is that Congress is entitled to chill publication by persons who violate the obscenity laws so long as it does so in language sufficiently precise, as it has here.

Nor is it significant in this regard that the remedy here is civil rather than criminal. "One would be bold to assert that the *in terrorem* effect of [criminal] statutes less restrains booksellers in the period before the law strikes than does [an otherwise constitutional civil remedy]." *Kingsley Books, supra,* 354 U.S. at

442. It would indeed be ironic if, in the name of preventing self-censorship, the courts were to strike down the relatively mild sanctions prescribed in Sections 4006 and 4007 and require that all postal obscenity questions be determined in criminal proceedings where the dealer's very liberty is at stake.

III. SECTION 4007, WHICH PERMITS PRELIMINARY RELIEF UNDER FED. R. CIV. P. 65 AFTER AN ADVERSARY JUDICIAL PROCEEDING IN WHICH THE ALLEGEDLY OBSCENE MATERIALS ARE SUBMITTED TO THE COURT, ALSO MEETS ALL NECESSARY CONSTITUTIONAL STANDARDS.

As already noted, Section 4007 was enacted to provide interim relief in both obscenity and fraud-lottery cases, on congressional findings that frequently the major profit in such unlawful enterprises is obtained in the first few weeks of their operation. S. Rep. No. 1818, *supra*, at 2. The section permits the Post Office to obtain an order under Fed. R. Civ. P. 65 impounding mail related to the activities challenged under Section 4005 or 4006 pending the outcome of administrative proceedings and any appeal. Like the administrative orders themselves, the relief is limited to mail which is uninspected or which, upon inspection, is found to be connected with the challenged activities. See, *e.g.*, *the orders* entered in the Section 4007 proceedings against *The Mail Box*, App., *infra*, at pp. 41–44. If the Post Office prevails, the impounded mail is then stamped and returned to its senders according to the appropriate statutory provision; if the addressee prevails, it is then delivered to him. The need for such a measure is clear, in view of the congressional findings; as applied in Section 4006 cases, it imposes

no unconstitutional burden on First Amendmen rights.

The attack on Section 4007 is premised chiefly o the contention that the finding of "probable cause" which that statute requires to justify a temporary mail detention order is insufficient. But the statut also provides that the procedures of Fed.R.Civ.P 65 shall govern, and this in turn, we believe, assure that Section 4007 proceedings will provide "a judi cial determination in an adversary proceeding [which] ensures the necessary sensitivity to freedom of expression * * *." *Freedman, supra,* 380 U.S. at 58 Under Rule 65, *ex parte* proceedings are appropriat only where time is the critical factor *and* a "showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Carroll* v. *President & Comm'rs of Princess Anne,* 393 U.S. 175, 180. Since Section 4007 relief could never be sought if a respondent's name and address were unknown, notification and, as a result, adversary proceedings will always be possible— and thus mandatory—in Section 4007 cases. That fact in itself assures that the challenged material will always be before the court in connection with its ruling on probable cause. In any event, under this Court's cases a finding of probable cause to believe material obscene could not be made without judicial inspection of the material. Cf. *A Quantity of Books* v. *Kansas,* 378 U.S. 205.

In an adversary, judicial setting, after inspection of the materials, and for the purpose only of authorizing interim relief, a finding of "probable cause" is

sufficient to defeat constitutional objection. The government bears the burdens of action and proof in these proceedings. The judge's examination of the material itself can be as thorough as if he were passing on the merits. Since only a limited class of material may permissibly be deemed obscene, *e.g.*, *Redrup v. New York*, 386 U.S. 767, the Section 4007 court must conclude that the questioned material is almost certainly within that class before it can grant interim relief. Only if the material, on its face, appeared to be in that limited class would a preliminary injunction be proper.

To be sure, there would remain the possibility that "redeeming social importance" or some other saving characteristic not apparent on the face of the materials themselves would appear at the administrative hearing, or on subsequent review. But the present restrictive judicial definition of constitutionally proscribable obscenity makes that possibility slight,[9] and the risk would be justified by the demonstration of need for emergency relief for public interests which would also be required to warrant the granting of preliminary relief.

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[9] The risk of error after such a proceeding would seem less, for example, than attends the issuance of arrest or search warrants, which may have the effect of restraining the liberty of a suspect in a criminal proceeding. And, we reiterate, the effect of a Section 4007 order is *not* directly to foreclose sales or distribution of the publication concerned (or continued operation of a scheme subject to Section 4005); those may continue, and orders and payments impounded during the life of the order will be delivered in the event the material is not found obscene. Compare *A Quantity of Books*, *supra*, 378 U.S. at 215–225 (Harlan, J., dissenting).

Under Rule 65, a showing by the government of need for emergency relief is fully as mandatory as a showing of probable cause to believe materials obscene. The congressional purpose in authorizing interim detention was to prevent commercial pornographers, lottery operators and makers of false representations from receiving the main portion of their profits while the administrative proceedings under Sections 4005 and 4006 were pending, and so effectively defeating any order that might evenutally be entered. Indeed, the legislative history reflects an understanding on the Department's part, accepted by Congress, that the interim remedy would be invoked only in such cases." S. Rep. No. 1818, *supra*, at 5; H. Rep. No. 945, 86th Cong., 1st Sess. (1959) 5–7; compare S. Rep. No. 2234, 84th Cong., 2d Sess. (1956). If it appears that the flow of remittances is not substantial or that the benefit to the government of issuing a Section 4007 order would be outweighed by the inconvenience and harm to the respondent, the district court would be entirely warranted in declining to issue a temporary detention order, even if it should find probable cause. See *Hecht Co.* v. *Bowles*, 321 U.S. 321.

[10] This factor is the sufficient answer to appellee The Book Bin's contention that the exemption of publications granted entry as second class mailing privileges from Section 4007 orders, 39 U.S.C. 4007(b), denies it equal protection of the laws. Second class privileges are available only for *mailable* matter (from which obscenity is excluded, 39 U.S.C. 4001) and to established publishing houses, 39 U.S.C. 4354; *Hannagan* v. *Esquire, Inc.*, 327 U.S. 146, 152. It was rational for Congress to conclude that publications which qualified for second class mail privileges would not warrant application of the extraordinary remedy of Section 4007, even if occasional issues might fall within Section 4006.

Proceedings under Rule 65 also assure the respondent publisher adequate protection against delay if a Section 4007 order is entered. While it is open to doubt whether undated picture magazines, such as those at issue here, require the same expedition of process as movies or books which can be said to raise issues regarding the currency of ideas, cf. *United States* v. *Seventy-seven Cartons of Magazines*, 300 F. Supp. 851, 853 (N.D. Cal.), a Rule 65 order may be dissolved or modified upon motion at any time.[11] One such occasion would be if undue delay occurred in the administrative process; to the extent it is applicable here (in the absence of "prior restraint"); *Freedman* does not foreclose the possibility of judicial rather than legislative control of the timeliness of civil obscenity determinations. 380 U.S. at 58–59. Another occasion for reexamination of the order would be upon conclusion of the administrative hearing, during pendency of an administrative appeal; the record made in the hearing would permit reassessment of the continuing need for mail detention. Finally, the preliminary injunction itself is subject to judicial review, with the attendant possibility that a stay may be procured. 28 U.S.C. 1292(a)(1); Fed. R. App. P. 8.

[11] The sponsor of Section 4007 in the Senate, Senator Monroney, stressed this flexibility as an advantage of Section 4007 procedure:

"The bill places the responsibility for detention of mail upon the courts instead of on an appointive officer. * * * [T]he court is always in charge. The right of freedom of communication, except where the law is being violated, is a basic personal right of all Americans. This was the right we sought to protect." (106 Cong. Rec. 15428 (1960)).

In short, while Section 4007 speaks of probable cause, judicial scrutiny will go much beyond that in practice; the proceeding takes place in the expeditious but scrupulous framework of Rule 65; and the traditional flexibility of courts of equity is available to balance conveniences, mitigate hardships and frame appropriately limited orders, subject to modification with changing conditions. For the same reasons as have already been shown with respect to Section 4006, a Section 4007 order places no improper burden on the exercise of First Amendment rights. Whether or not questions might be raised as to the scope or propriety of particular orders entered,[13] the statute admits of constitutional application, and thus is not unconstitutional on its face.

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[13] The district court in *The Book Bin* construed the statute too broadly when it stated that a Section 4007 order could detain *all* of a respondent's incoming mail. As discussed above, p. 33, while an inspection procedure is often necessary, the only mail retained after inspection would be that specifically relating to the publications involved—in the case of *The Book Bin*, "Models of France." See, for example, the Section 4007 orders entered against *The Mail Box*, pp. 41–44, *infra*. So limited, Section 4007 orders give no offense to this Court's decision in *Lamont*.

CONCLUSION

For the foregoing reasons, the judgments of the district courts should be reversed.

Respectfully submitted.

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JULY 1970.

APPENDIX

United States District Court Central District of California

Civil No. 68–1983 R

UNITED STATES OF AMERICA AND THE POSTMASTER GENERAL, PLAINTIFFS

v.

THE MAIL BOX, DEFENDANT

TEMPORARY RESTRAINING ORDER

Upon reading the verified Complaint of the plaintiffs, and good cause appearing therefor,

It is hereby ordered that the Post Office Department is directed to detain the defendant's incoming mail for ten (10) days from the date hereof. This order is made upon a showing having been made that there is probable cause to believe that 39 U.S.C. § 400[6] is being violated by the defendant in its mailings of the magazines "Me"; "Gigi"; "Susy"; "Match"; "Bunny"; "Golden Girls"; and "Girl Friends", and that the effective enforcement of 39 U.S.C. § 4006 can only be had if the status quo is preserved during the pendency of the administrative proceedings being held under 39 U.S.C. § 400[6].

It is further ordered that a hearing on the plaintiff's prayer for a preliminary injunction is set for the 9th day of December, 1968, at 2:00 p.m.

Dated at Los Angeles, California, December 3rd, 1968.

MANUEL L. REAL,
United States District Judge.

United States District Court, Central District of California

Civil No. 68–1933–R

UNITED STATES OF AMERICA AND THE POSTMASTER GENERAL, PLAINTIFFS

v.

THE MAIL BOX, DEFENDANT

PRELIMINARY INJUNCTION

This cause came on for hearing on December 11, 1968, before the Honorable Manuel L. Real, United States District Judge presiding; the Court having announced its findings whereby the Court found that a preliminary injunction should issue under 39 U.S.C. § 4007 because there is probable cause to believe that 39 U.S.C. § 4006 is being violated by the defendant in its mailing of the magazines "Me"; "Gigi"; "Susy"; "Match"; "Bunny"; "Golden Girls" and "Girl Friends"; and that the effective enforcement of 39 U.S.C. § 4006 can only be had if the status quo is preserved during the pendency of the administrative proceedings being held under 39 U.S.C. 4006; it is therefore,

Ordered that a preliminary injunction issue, and it is hereby issued, directing the Post Office Department to detain the defendant's incoming mail during the pendency of the administrative proceedings being held under 39 U.S.C. § 4006.

It is further ordered that the detained mail may be opened to examination by the defendant and such mail shall be delivered to the defendant as is clearly not connected with the alleged unlawful activity.

Dated: This 26th day of December 1968.

MANUEL REAL,
United States District Judge.

United States District Court

Central District of California

Civil No. 68–1983 R

UNITED STATES OF AMERICA AND THE POSTMASTER GENERAL, PLAINTIFFS

v.

THE MAIL BOX, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing on December 11, 1968, before the Honorable Manuel L. Real, United States District Judge presiding; the Court having considered the affidavits filed by the respective parties and the magazines and advertising which are the subject matter of this proceeding; and the matter having been submitted to the Court for its decision, the following are announced as the Court's Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

There is pending an administrative proceeding in the Post Office Department which is being held under 39 U.S.C. § 4006.

II

The Postmaster General has applied for a preliminary injunction under the authority of 39 U.S.C. § 4007.

III

There is probable cause to believe that 39 U.S.C. § 4006 is being violated by the defendant in its mail-

ing of the magazines "Me"; "Gigi"; "Susy"; "Match"; "Bunny"; "Golden Girls"; and "Girl Friends".

IV

Effective enforcement of 39 U.S.C. § 4006, can only be had with respect to the magazines listed in Finding of Fact No. III, if the status quo is preserved during the pendency of the administrative proceedings being held under 39 U.S.C. § 4006.

CONCLUSIONS OF LAW

I

This Court has jurisdiction under 28 U.S.C. § 1345 and 39 U.S.C. § 4007.

II

There is probable cause to believe that 39 U.S.C. § 4006 is being violated by the defendant in its mailing of the magazines "Me"; "Gigi"; "Susy"; "Match"; "Bunny'; Golden Girls'; and "Girl Friends".

III

The preliminary injunction being prayed for by the Postmaster General should issue under 29 U.S.C. § 4007 to preserve the status quo during the pendency of the administrative proceedings being held under 39 U.S.C. § 4006.

Dated: This 26th day of December 1968.

MANUEL REAL,
United States District Judge.

Post Office Department, Washington, D.C.
P.O.D. Docket No. 3/9

IN THE MATTER OF THE COMPLAINT AGAINST THE MAIL BOX AT P.O. BOX 3192, NORTH HOLLYWOOD, CALIFORNIA

Departmental Decision

APPEARANCES:

For the Complainant:
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Jerry P. McKinnon, Esq.
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Post Office Department
Washington, D.C.

For the Respondent:
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INTRODUCTION

By complaint filed November 1, 1968, the General Counsel of the Post Office Department (the Complainant) alleged that The Mail Box (the Respondent) is conducting through the mails an enterprise in violation of 39 U.S.C. § 4006. The Complainant concurrently moved for an expedited hearing to be presided over by the Judicial Officer. On November 4, 1968 the Judicial Officer granted the motion for the expedited hearing.

The Respondent's answer, filed November 18, 1968, denied the allegations of the complaint. The Respondent concurrently moved to dismiss the complaint upon the grounds that it failed to state a violation of § 4006, that it violates the Respondent's rights under the First and Fifth Amendments to the United States Constitution, and that the seven magazines against which the complaint was brought (hereinafter the "Magazines") are legally indistinguishable from others heretofore found to be protected. The Respond-

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ent also requested that the Judicial Officer take judicial [sic] notice of certain of those previous decisions. By reply filed November 22, 1968 the Complainant argued against the Respondent's motion and cross-moved to strike portions of the Respondent's pleadings. On November 26, 1968 the Judicial Officer denied both the Respondent's motion and the Complaint's cross motion, and ruled that Postal Manual § 821.331 (b) deprives him of the authority "to determine the constitutionality of statutes".

The hearing herein was held in Los Angeles, California, on December 3–5, 1968. At the conclusion thereof the Judicial Officer announced that decision would be reserved pending submission of proposed findings of fact and memoranda of law by the parties. Such papers were to be filed within five days of the delivery of a copy of the transcript of the hearing to counsel for the Complainant.

Counsel for the Respondent moved that a copy of the transcript be supplied to the Respondent free of charge. The Judicial Officer denied the motion, without prejudice to later renewal, upon the ground that counsel had failed to make any showing in support thereof. Counsel then asked that he be permitted to submit his memorandum without page citations of the record. The request was granted.

The final volume of the transcript was delivered to counsel for the Complainant on December 18, 1968 and the latter's proposed findings of fact, proposed conclusions of law and memorandum of law were filed on December 23, 1968. A similar document on behalf of the Respondent was filed on December 28, 1968.

THE COMPLAINT

The complaint charges as follows:

"The undersigned, Assistant General Counsel, Mailability Division, Post Office Department, has probable cause to believe, and therefore alleges, that under the name set forth in the caption hereof (hereinafter called the Respondent) there is being conducted through the mails an enterprise in violation of Section 4006, Title 39 U.S. Code, and in support of that belief alleges as follows:

"(1) That the Respondent is now and for some time heretofore has been obtaining and attempting to obtain remittances of money through the mails for obscene, lewd, lascivious, indecent, filthy or vile articles namely certain magazines;

"(2) That the Respondent is depositing or causing to be deposited in the United States mails circular matter giving information as to where, how, or from whom articles and things of an obscene, lewd, lascivious, indecent, filthy or vile nature may be obtained;

"(3) That attached hereto as Exhibits A through G are true copies of the said circular matter mentioned in the item next above;

"(4) That to persons remitting to Respondent, the sums of money stated in the aforesaid advertisements and solicitations, Respondent sends articles, among them the following magazines which are of an obscene, lewd, lascivious, indecent, filthy or vile nature;

"'ME'
"'GIGI'
"'SUSY'
"'MATCH'
"'BUNNY'
"'GOLDEN GIRLS'
"'GIRL FRIEND'

"(5) That Respondent is using the mails for the conduct of an enterprise whereby it conveys obscene, lewd, lascivious, indecent, filthy, or vile articles to all those who make appropriate remittances of money therefor.

"WHEREFORE, pursuant to the provisions of Title 39, U.S. Code, Section 4006, it is requested that an appropriate order issue to the appropriate postmasters to dispose of all mail addressed for delivery to, and money orders drawn in favor of, THE MAIL BOX, or agents or representatives as such, in accordance with the provisions of said Title 39, U.S. Code, Section 4006."

THE EVIDENCE

Six witnesses appeared on behalf of the Complainant. The thrust of their testimony was as follows:

Donald Schoof, a postal inspector, established jurisdiction and testified with respect to the conduct of the investigation of this case.

Marshall La Cour, head of the photography department at Cypress Junior College, Cypress, California was established as an expert in photography and testified that the photographs in the Magazines displayed poor photographic composition and technique and that they were inartful and entirely without aesthetic quality.

Dr. Melvin Anchel, a phychiatrist, testified that the Magazines lacked any kind of psychological or other value for normal persons of any age, can arrest the normal development of children, can cause "cliff-hanging" adults to regress to an earlier stage of sexual development and "are making neurotics." He described them as unwholesome and dangerous even to psychologically healthy adults who are more than casually and infrequently exposed to them because of the Mag-

azines' obsessive preoccupation with a distorted view of sex. He found them a "cancer" on society.

E. Richard Barnes, a California State Assemblyman, testified that some of his constituents complained to him about materials which they regarded as obscene, but which he thought were considerably less explicit than the Magazines.

Arthur J. Kates, the head of a large periodical distributing company covering all types of neighborhoods in Los Angeles, stated that his company would not agree to distribute the Magazines and that if it did its business would be destroyed.

Charles Crecelius, a salesman, former elementary school principal and vice chairman of the Los Angeles County Commission on Obscenity and Pornography, was established as a person who has expertise concerning the contemporary community standards in the Los Angeles area and in the United States relative to sexual matters. Mr. Crecelius testified that the Magazines affront contemporary community standards in Los Angeles and the United States relating to the description or representation of sexual matters.

The only witness testifying for the Respondent was *Robert C. McDaniel,* Esq., a practicing lawyer who appeared for the Respondent herein and serves as an associate of Stanley Fleishman, Esq., the Respondent's attorney, Mr. McDaniel was qualified as an expert in constitutional law with particular reference to obscenity. He opined that the Magazines were protected by previous court decisions which had held other magazines which he found comparable to be not obscene.

DISCUSSION

Six of the seven Magazines are composed of exactly 32 printed pages roughly 8½ by 11 inches in size,

stapled together in typical magazine form. The 24 pages of the seventh magazine, *Me*, measure about 5½ by 8½ inches. Each of the Magazines is composed largely of photographs of nude or semi-nude women. Such scant written material and advertising as appears in the Magazines relates exclusively to subjects bearing upon physical sex and nudity.

The seven Magazines can be divided into three categories, insofar as their content and format are concerned:

1. *Girl Friend, Golden Girls, Bunny* and *Match* follow an identical format. The 32 pages (including covers) of each magazine are precisely divided into:

—23 pages of photographs in each of which one nude woman is shown, usually with thighs spread so as to display her genitals. None of the photographs is captioned or specifically linked in subject with the magazines' written material.

—3¼ pages are devoted to a table of contents and advertisements displaying the covers of other publications of a similar nature, touting a "nudist film," Danish "studies in the nude art" and a certain "Studio 'A'" in New York City where one is invited to "photograph female figure models" or skin paint—"try your own designs directly on our female FIGURE MODELS."

—5¾ pages are divided among four articles which are either unsigned or attributed to such presumably pseudonymous authors as "Stanley Sorrel," "Stan Morrel," and "Stanley Howard," or "Hal Lyons" and "Hal Saint." The articles are given titles such as "Invitation to Rape," "Paradise for Swingers," "Is Wife-swapping for Real?" and "The Nude Imperiled."

The only variation to this rigid formula is found in *Golden Girls,* which substitutes an additional half-page of articles for a half-page of advertising. Each of these four of the Magazines lists one Bradford I. Boone as its editor. An identical statement below the table of contents in *Girl Friend* and *Bunny* describes each magazine as:

> a publication seeking to communicate contemporary views relating to sex to prevailing mores. We observe and report on life as it is.

The parallel statement in *Golden Girls* and *Match* proclaims each of those publications as:

> a journal equating the nude to contemporary mores. Its goals will be achieved by way of free communication and exemplary photo-artistry establishing the wholesomeness, beauty and charm of the unadorned figure.

2. *Gigi* and *Susy* allot their 32 pages in slightly different proportion.

> —28 pages of *Susy* and 28¾ pages of *Gigi* are given over to captionless photographs of lasciviously posed nude girls. In *Susy* only a total of 5 pages of photographs depict more than one girl per study, but in *Gigi* more than half of the pictures show two or three naked women embracing or otherwise disporting themselves, with the major photographic focus upon their genitals.
>
> —2 pages go to advertisements beckoning the reader to buy more pictures of some of the girls purportedly shown in the two magazines, an "unretouched female indoor nudist film" and still photo-sets, and two magazines, one of which is called *Lesbianism—A Sexual Study* ("100 intimate fotos [sic] of lesbians—20 case histories") and the other *Sadism and Masochism* ("60 intimate fotos—20 models" and a thorough study on "spanking and the Lesbian" and "homosexual spanking").

—*Susy* devotes its remaining 2 pages to an unsigned story entitled "The Conversion" which purports to detail, in the first-person, the seduction into lesbianism of a girl increasingly dissatisfied with her intensely active heterosexual life. *Gigi* spares about 1¼ pages to a fictional story about a girl's successful utilization of her body on the road to movie stardom.

Neither magazine contains a printed word other than in its single story, the two pages of advertising and the front cover.

3. The only printed words appearing in *Me*, the seventh magazine, are on its cover. The rest of the publication is given over entirely to the familiar gallery of uncaptioned photographs of one or several naked women in the usual noisome poses.

The women depicted in each of the Magazine's photographs are almost always positioned in such a fashion as to display their genitals prominently and in clinical detail. The models are typically portrayed with thighs widely parted or in some other forced and unnatural position which serves to spread or otherwise feature their organ and focus attention upon it. When they are shown partially clothed the clothes are so arranged as to further stress the photographic focus on the sexual organ.

Printed in ⅛ to ¼ inch type at the bottom of the front cover of each of the Magazines there appear the words "Adults Only" or, in the cases of *Susy and Gigi*, "For Adults Only." The order blanks attached to the Respondent's circulars bear a statement that the remitter must be at least 21 years old. However these outward manifestations of Respondent's concern are not part of a serious effort to deter indiscriminate circulation of the Magazines to minors. On the contrary, they serve both as additional enticement and as a sort of verbal screen behind which the Respondent con-

ducts its business in a fashion which negatives such concern and which, in fact, almost precludes further efforts to ascertain a remitter's age.

Donald Schoof, the postal inspector, in establishing jurisdiction, testified to the complaint of postal patrons against mail receipt of the Respondent's pandering solicitations and his own use of the mails in sending for the Magazines (34 ff.).* Mr. Schoof's testimony revealed that he simply sent the Respondent one of the latter's own printed order forms and the required money and was sent the Magazines in return. He could quite easily have been well under 21 years of age for all the Respondent knew or, one may suppose, cared.

In *Roth* v. *United States* (1956) 354 U.S. 476 and in several decisions that followed the United States Supreme Court defined obscenity in these terms [*Memoirs* v. *Massachusetts* (1965) 383 U.S. 413, at p. 418]:

> * * * three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The evidence adduced by the Complainant established that the dominant theme of the material taken as a whole appeals to the prurient interest [*Roth* v. *United States, supra,* at p. 489; *Memoirs* v. *Massachusetts, supra,* at pp. 418–19; *Jacobellis* v. *Ohio* (1963)

*References, unless otherwise noted, are to pages of the typed transcript of the hearing.

378 U.S. 184, 191; *Manual Enterprises* v. *Day* (1961) 370 U.S. 478, 486–8].

The witness Dr. Anchell did not know the meaning of the word "prurient" (134–5, 223), but he did describe the Magazines in terms which are used by the Webster Dictionary to define "prurient"—namely, "1. having lustful ideas or desires. 2. lustful; lascivious; lewd: * * *." Thus, the doctor found the Magazines, among other things, "lewd," "lascivious" and "filth" and stated that their effect would be to stimulate the reader sexually and push him in the direction of perverted forms of sexual expression—"It conjures up earlier developmental stages, times which the visual gave this individual or the exhibitionist, voyeuristic pleasures gave this individual more satisfaction than the normal mature sexuality, and so he is brought back very strongly with such stimuli." (151, 136–152, 161–6, 181–2, 223–5, 248–9.)

Mr. La Cour, the photographer, testified that in almost every one of the photographs in the Magazines the pubic area of the model shown has been "foreshortened"—that is, a photographic technique has been used to bring the model's pubic area too close to the camera for correct perception in order to "force" the observers' attention upon it (100–1).

Any lingering doubt about the Respondent's intent to appeal to the prurient interest and its success in so doing is dissipated by an examination of the circular [Exhibits A, B, F2(1), N–1(b)] by which the Respondent advertised the Magazines and solicited orders for them [see *Ginzburg* v. *United States* (1965) 383 U.S. 463, 470–4 and *United States* v. *Rebhuhn* (C.A. 2, 1940) 109 F.(2d) 512, 515, concerning role of advertising]. Each of the Magazines was advertised in flyers which appeal to the full range of human sexual deviations and perversions. Thus we find an

issue of *Me* advertised under the heading "Female Nudist Specials" among photos of the covers of 24 other such publications each of which shows a nude or semi-nude girl in a pose typical of those in the Magazines themselves. The same circular advertises, in the same manner, 25 "Spanking, Bondage & Flag Mags.," "20 New Paperbacks * * * bound in full color covers * * * banned from the U.S.A. until recently" and 18 "Sexual Study Books" including *Sadism and Masochism, Female Masturbation, New Breast Fetishism* and *A Study of the Peeping Tom* * * * *Plus 60 Revealing Photos of Women Caught Unaware of the Fact that they were being Photographed NUDE.*

Suffice it to say that the other advertising adduced at the hearing, by which the Respondent solicited orders, is characterized by the same unrelieved, leering sordidness. For accuracy, none of the advertising can surpass Exhibit F2(1) which, in touting *Girl Friend, Bunny, Golden Girl* and *Match,* promises:

> Unusual photographic techniques, exploring every nook and cranny of the female form. Additional emphasis is placed on the *inner* beauty of our models, as the camera explores bodily regions never attempted before. Close attention to detail * * *.

If the dominant theme of the material taken as a whole—largely photographs of nude or semi-nude women with legs akimbo and uncovered pubes presented to the camera—cannot be taken as an appeal to the prurient interest then, indeed, the word "prurient" and those other words by which it is defined have ceased to have any meaning.

The second of the elements of obscenity requires an inquiry as to whether the Magazines are patently offensive because they affront contemporary community standards relating to the description of repre-

sentation of sexual matters [*Roth* v. *United States, supra,* at p. 489; *Memoirs* v. *Massachusetts, supra,* at pp. 418–19; *Jacobellis* v. *Ohio, supra,* at pp. 191–5; *Manual Enterprises* v. *Day, supra,* at pp. 486–7].

Exhaustive examination on the point established the witness Crecelius' unusual interest and activity in the area of pornography and obscenity. It was clear that he approached the problem from his own personal standpoint and lacked a sophisticated background in the subject. However, it became equally evident that his sustained interest, voluntary work and official position in his home community of Los Angeles, and wide and continuous travel and inquiry on the subject within the United States, qualified him to deliver an opinion regarding contemporary standards in Los Angeles and the United States relating to the description or representation of sexual matters. In his opinion the Magazines fell below such standards.

Mr. Barnes, the assemblyman, testified that Californians "repeatedly" (273) complained to him about materials considerably less explicit than the Magazines.

Mr. Kates, the owner and chief executive officer of Sunset News Company, a large periodical distributor in the Los Angeles metropolitan area, testified that Sunset distributes, *inter alia,* magazines such as *Playboy, True* and *Cavalier,* which depict women in the nude or semi-nude. However he said, "I can make the unqualified statement if the Sunset News Company distributed any one of the periodicals that I have examined [the Magazines] to our dealers, they would not only not be accepted, but it would result in the destruction of Sunset News Company" (290–1). He further declared that "The distribution of these periodicals in my opinion through any legitimate trade

channels would result in the destruction of those channels. They are not acceptable at any price" (298).

I find that the Magazines considerably exceed the customary limits of candor in the United States and affront contemporary community standards relating to the description or representation of sexual matters. They are therefore patently offensive.

Even though the Magazines' patent offensiveness and their appeal to the prurient interest have been ascertained they cannot be found obscene unless it can also be determined that the material they contain is without "the slightest redeeming social importance" [*Roth* v. *United States, supra,* at p. 484; *Memoirs* v. *Massachusetts, supra,* at pp. 418–19; *Jacobellis* v. *Ohio, supra,* at p. 191].

Dr. Anchell's persuasive and uncontroverted testimony established that, far from having any beneficial effect upon readers young and adult, emotionally stable and unstable, perverted and "normal," this material could only have a distinctly damaging impact if it had any at all. The best that could be hoped for was that it would have none.

From the witness La Cour we learned that the pictures, which occupy anywhere from a minimum of about eighty percent to a maximum of one-hundred percent of the Magazines' space, are bad photography and lacking in artistic or aesthetic quality.

Me, of course, lacks written material, and only 1¼ pages in *Gigi,* 2 pages in *Susy,* 5¾ pages in *Girl Friend, Bunny* and *Match,* and 6¼ pages in *Golden Girls* are given over to some kind of writing. Each of them, with the exception of the fiction in *Gigi* and *Susy,* is devoted to some ostensibly serious topic on the subject of sex or nudity. None of them makes any attempt to contribute to the sum of human knowledge, seriously promote a social cause, provide useful in-

formation, or even entertain, except perhaps by catering to the presumed needs of particularly obsessive readers. The same can be said of *Gigi's and Suzy's* fiction.

The pro-forma assertions of serious intent hoisted like a talisman near the mastheads of *Girl Friend, Golden Girls, Bunny* and *Match* and quoted on page 8 hereof, proclaim a serious and socially redeeming value which those and the other Magazines fail to deliver. Needless to say the Respondent's advertising heralds the very reverse of the serious social purposes which the Magazines proclaim they serve. The mere recitation of a formula or the insertion of a few stock paragraphs or pages of written filler material will not serve to lend redeeming social importance to a publication which would otherwise lack it.

I find the Magazines lacking "even the slightest redeeming social importance."

The Respondent's case was based entirely upon the contention that various courts of law and the Post Office Department itself had passed upon other publications represented as being of a similar nature and had found them to be not obscene. In other words, the Respondent offered no evidence in rebuttal of the Complainant's case but, rather, argued the law.

The precedents presented and the samples of the materials on which they turned are as follows (in the order offered):

United States v. *Three Packages*, Civil No. 68-25-F, U.S.D.C., Cent. Dist. Cal. (Ferguson, J.), findings of fact and conclusions of law, Feb. 20, 1968 (Exhibits R-1).	Exhibits 3-9.
United States v. *80 Cartons*, Civil No. 68-480-IH, U.S.D.C., Cent. Dist. Cal. (Hill, J.), findings of fact and conclusions of law, April 30, 1968 (Exhibit R-2).	Exhibits 6-10.
Magazines which enjoy second-class mailing privileges granted by the Post Office Department.	Exhibits 13-20.

People v. *Bonanza Printing Co., Inc., et al.*, No. 317074, Los Angeles Municipal Court (Ackerman, J.), Nov. 8, 1968. Exhibits 21–22.

Felton v. *Pensacola* (1968) 390 U.S. 340 ---------- Exhibits 23–27.

United States v. *Six Parcels of Photographs*, Civil No. 66-1129-PH, U.S.D.C., Cent. Dist. Cal. (Hall, J.), order granting motion for Summary Judgment and Judgment, Dec. 3, 1968 (Exhibit R–28). Exhibits 28 a–e.

In rebuttal, the Complainant offered the decision, findings of fact, conclusions of law and order of dismissal of the U.S. District Court for the Central District of California (Hauk, J.) in *Marvin Miller, et al.* v. *Thomas Reddin, et al.*, No. 68–712–AAH, of November 18, 1968 (Exhibit O) and *Female Photographs* (Exhibit O–1), one of the publications passed on in that case. Subsequent to the hearing herein another judge of the same court (Real, J.) found the same publication not obscene in a criminal trial of that issue (*United States* v. *Marvin Miller*, Nos. 1842, 2166, 2396).

I find that none of these decisions provide me with a binding precedent. In *Felton* v. *Pensacola, supra*, the Supreme Court, citing *Redrup* v. *New York* (1967) 386 U.S. 767, held distribution of the materials at issue to be protected by the First and Fourteenth Amendments. It is obvious at a glance that the materials which the Court there ruled on differ from the Magazines here at issue in several particulars touching upon each of the three elements by which the Supreme Court defined obscenity in *Roth* and the decisions that followed.

Without getting into matters of comparison, I find that the value of the three California district court decisions offered by the Respondent as precedents in defining the parameters of permissible expression, is nullified by the same court's contrary holding on the book *Female Photographs* (Exhibit O–1) in *Miller* v.

Reddin, supra, which, in turn, is further confused by the holding in *United States* v. *Marvin Miller, supra.* Nor will I accept a decision of the Los Angeles Municipal Court as a binding interpretation of obscenity under the federal statute. Likewise, the mere granting of second-class entry to certain publications establishes no formal or informal precedent which is binding upon the Judicial Officer in rendering a departmental decision. The regulations of the Department provide that such action is actually subject to the Judicial Officer's review on appeal by a rejected applicant. It might also be noted that on only one occasion since the Supreme Court raised a fundamental question as to the Department's administrative jurisdiction in 1961 in *Manual Enterprises* v. *Day, supra,* has the Department sought to deny second-class entry to a publication on grounds of obscenity.

For some years now the basic questions relating to obscenity have given rise to an intense public debate: Is the concept of obscenity worthy of retention; do concededly obscene materials indeed have an unwholesome or unhealthy effect upon society or any of its individual members; and do any public agencies therefore have the right to inhibit the free circulation of concededly obscene materials on that ground? The ultimate answers to these questions must await, among other things, greater empirical knowledge of the impact of erotica on society. But for the present the appropriate authorities in our society, the Congress and the United States Supreme Court, have answered all three questions in the affirmative. The Congress has also long imposed upon this Department the right and duty of exercising a certain limited scrutiny over materials distributed through the mails, and the Supreme Court has not specifically relieved us of that function.

Since the concept of obscenity as an offense to society's standards and best interests yet remains in our system of law, it would be logically inconsistent to deprive it of any meaningful content. No fair-minded observer could possibly conclude that these Magazines with their page upon endless page of pictures of naked women with spread thighs, are designed for any purpose other than as an appeal to the prurient interest; and one would have to be prepared to conclude that the prurient appeal is of itself socially important in order to discern the element of redeeming social value in the Magazines. While that portion of the Complainant's presentation specifically directed to the issue of offense to contemporary community standards was not particularly impressive, the evidence as a whole amply established the fact that Americans as a whole are not yet prepared to grant such grossly commercial, artistically worthless, socially unexpressive and otherwise valueless erotica an accepted place in the panoply of diverse utterances which flourish in a free society.

Hence until such time as the concept of obscenity has been abandoned for good and all or so drastically restricted as to apply, for example, only to depictions of sex acts—as the California Supreme Court is recently reported to have suggested—or until this Department is conclusively stripped of its legal duties in regard to obscenity, there can be no doubt that prevailing legal and cultural norms require the findings and conclusions contained herein.

In accordance with the foregoing decision I now make my formal Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

1. The Respondent has deposited in the mails advertisements or circular matter giving information as to where, how or from whom the magazines *Me* No. 4; *Gigi* Vol. 1, No. 3; *Susy* Vol. 1, No. 1; *Match* No. 1; *Bunny* No. 1; *Golden Girls* No. 1 and *Girl Friend* No. 1 could be obtained.

2. The Respondent sent the aforesaid magazines to persons remitting to the Respondent the sums of money stated in the aforesaid advertisements or circular matter.

3. The dominant theme and predominant appeal of each of the aforesaid magazines, taken as a whole, is to the prurient interest in sex. They are patently offensive to contemporary community standards relating to the description or representation of sexual matters and are utterly without redeeming social importance.

4. The following Conclusions of Law, insofar as they may be deemed Findings of Fact, are so found to be true in all respects. From the foregoing facts I conclude:

CONCLUSIONS OF LAW

1. The magazines *Me* No. 4; *Gigi* Vol. 1, No. 3; *Susy* Vol. No. 1; *Match* No. 1; *Bunny* No. 1; *Golden Girls* No. 1 and *Girl Friend* No. 1 are obscene, and therefore do not constitute constitutionally protected expression.

2. "The Mail Box" is a person who is obtaining or attempting to obtain remittances of money through the mail for the seven aforesaid magazines which are obscene, lewd, lascivious, indecent, filthy or vile within the meaning of 39 U.S.C. § 4006.

3. "The Mail Box" is a person who is depositing, or causing to be deposited, in the United States Mail

information as to where, how and from whom the addressee may obtain magazines which are obscene, lewd, lascivious, indecent, filthy or vile within the meaning of 39 U.S.C. § 4006.

4. The activities set forth in conclusions 2 and 3 constitute a violation of the provisions of 39 U.S.C. § 4006 governing the use of the United States Mails for the advertising of, or receipt of remittances for unlawful matter.

5. Any Conclusions of Law contained in the Findings of Facts are incorporated herein by reference.

CONCLUSION

For all of the foregoing reasons I find that the Respondent's activities complained of constitute an enterprise in violation of 39 U.S.C. § 4006. An order to the appropriate postmasters pursuant to the provisions of 39 U.S.C. § 4006 will, accordingly, issue forthwith.

PETER R. ROSENBLATT,
Judicial Officer.

MEMORANDUM—U.S. POST OFFICE DEPARTMENT

DECEMBER 31, 1968.

Subject: Transmittal of unlawful order.
From: Judicial Officer, Post Office Department, Washington, D.C. 20260.
To: Postmaster, North Hollywood, California.
In reply refer to: P.O.D. Docket 3/9.

I enclose herewith a copy of Order No. 68–103, dated December 31, 1968, forbidding the delivery of mail and the payment of money orders to:

THE MAIL BOX, P.O. Box 3192
at
North Hollywood, California 91609

This order does *not* cover (1) mail under frank or (2) mail covered by a penalty envelope or (3) mail which appears to be unconnected with the activity covered by the order. Mail in the third category frequently includes, but is not necessarily limited to letters from public utilities, Federal, State and Municipal agencies, or lawyers and magazines or newspapers. Mail in any of these three categories should be delivered to the addressee.

All mail which does not clearly appear to be in one of the three above categories shall be held for the addressee for no less than 24 hours after its receipt. The addressee or his representative, but no other person, shall have the right to open and inspect such mail at a reasonable hour during the said 24 hour period, in the presence of the postmaster or some postal employee designated by him. If an inspection cannot be held within 24 hours because of intervening holidays or other unforeseen circumstances, another 24 hours, or more, if necessary, should be allowed for inspection.

After such joint inspection so much of the inspected mail as has been shown to be unconnected with the enterprise covered by the enclosed order shall be turned over to the addressee or his representative.

Any mail containing cash, checks, or money orders apparently in payment for merchandise connected with the enterprise covered by the enclosed order and any other mail connected therewith, except for mail containing demands for refunds, shall be withheld and immediately returned to the postmaster at the point of mailing, for delivery to the sender. However, all mail containing demands for refunds shall be turned over to the addressee or his representative even though connected with the enterprise covered by the enclosed order.

Please acknowledge receipt of this memorandum and of the enclosed order. Any question concerning the enforcement of the order should be directed to me at the above address.

PETER R. ROSENBLATT,
Judicial Officer.

POST OFFICE DEPARTMENT,
Washington, December 31, 1968.

Order No. 68–103.

To the Postmaster at North Hollywood, California 91603.

Satisfactory evidence having been presented to the Post Office Department that the United States mails are being used by:

THE MAIL BOX, P.O. Box 3192
at
North Hollywood, California 91609

and their agents and representatives (hereinafter the "Respondent") in violation of Section 4006 of Title 39, United States Code, which prohibits obtaining or attempting to obtain remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, and depositing or causing to be deposited in the mails information as to where, how or from whom the same may be obtained, the said evidence being a part of the record in the case identified below by docket number (hereinafter the "unlawful activity"),

Now, therefore, by virtue of the authority vested in the Postmaster General by the provisions of said law, and by him delegated to me (Public Law 86–676, approved July 14, 1960, and 26 F.R. 10813, November 18, 1961), I hereby forbid you to pay any postal money order drawn to the order of the said Respond-

ent. I further direct you to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon presentation of said order at the issuing office or, in the event the orginal order is not available, that repayment may be effected by means of a duplicate order obtained under regulations of the Department.

You are further directed to hold all mail, whether registered or not, which shall arrive at your office directed to said Respondent except for so much thereof as can be identified on the face of the wrapper as not relating to the unlawful activity. All mail not so identified shall be held for 24 hours after its receipt, during which time the Respondent shall have the right to examine the mail so held at a reasonable time, in your presence or the presence of a postal employee designated by you, and receive such mail as is not connected with the unlawful activity, including mail requesting a refund or return of merchandise.

You are further directed to write plainly or stamp the word "Unlawful" upon the outside of all the mail connected with the unlawful activity and return it to the postmasters at the offices where it was mailed, to be returned to the senders. Where there is nothing to identify the senders of such mail it shall be sent to the appropriate dead letter branch with the word "Unlawful" plainly written or stamped thereon, to be disposed of as dead matter under the laws and regulations applicable thereto.

P.O.D. Docket No. 3/9, G.C. 4370.

PETER R. ROSENBLATT,
Judicial Officer.

POST OFFICE DEPARTMENT,
JUDICIAL OFFICER,
Washington, D.C., July 6, 1970.

P.O.D. Docket No. 3/9
In the Matter of the Complaint Against
THE MAIL BOX
at
P.O. Box 3192
North Hollywood, California 91609

ORDER

The Complainant has filed an application to clarify Order No. 68–103, dated December 31, 1968, in regard to the case appearing in the caption hereof. The clarification requested consists of the identifying by name of the magazines which the Judicial Officer found in this proceeding to be obscene.

Good cause therefor being shown, and since the clarification requested will not be prejudicial to the rights of the Respondent, the application for clarification of Order No. 68–103, dated December 31, 1968, is hereby granted and a new order bearing the number 70–24 and bearing the same date as the date of this order will issue forthwith.

WILLIAM A. DUVALL,
Acting Judicial Officer.

MEMORANDUM

JULY 6, 1970.

Subject: Transmittal of unlawful order.
From: Judicial Officer, Post Office Department, Washington, D.C. 20260.
To Postmaster, North Hollywood, CA 91609.

I enclose herewith a copy of Order No. 70–24, dated July 6, 1970 forbidding the delivery of mail and the payment of money orders to:

THE MAIL BOX, P.O. Box 3192
at
North Hollywood, California 91609

This order does *not* cover (1) mail under frank or (2) mail covered by a penalty envelope or (3) mail which appears to be unconnected with the activity covered by the order. Mail in the third category frequently includes, but is not necessarily limited to letters from public utilities, Federal, State and Municipal agencies, or lawyers and magazines or newspapers. Mail in any of these three categories should be delivered to the addressee.

All mail which does not clearly appear to be in one of the three above categories shall be held for the addressee for no less than 24 hours after its receipt. The addressee or his representative, but no other person, shall have the right to open and inspect such mail at a reasonable hour during the said 24 hour period, in the presence of the postmaster or some postal employee designated by him. If an inspection cannot be held within 24 hours because of intervening holidays or other unforeseen circumstances, another 24 hours, or more, if necessary, should be allowed for inspection.

After such joint inspection so much of the inspected mail as has been shown to be unconnected with the enterprise covered by the enclosed order shall be turned over to the addressee or his representative.

Any mail containing cash, checks or money orders apparently in payment for merchandise connected with the enterprise covered by the enclosed order and any other mail connected therewith, except for mail containing demands for refunds, shall be withheld and immediately returned to the postmaster at the point of mailing, for delivery to the sender. However, all mail containing demands for refunds shall be turned over to the addressee or his representative even though connected with the enterprise covered by the enclosed order.

Please acknowledge receipt of this memorandum and of the enclosed order. Any question concerning the enforcement of the order should be directed to me at the above address. As used herein, the terms "activity" and "enterprise" should be interpreted as being limited to the sale or the attempted sale through the mail of the seven publications named in the accompanying order.

WILLIAM A. DUVALL,
Acting Judicial Officer.

POST OFFICE DEPARTMENT,
Washington, July 6, 1970.

To the POSTMASTER at North Hollywood, California 91603.

Satisfactory evidence having been presented to the Post Office Department that the United States mails are being used by:

THE MAIL BOX, P. O. Box 3192
at
North Hollywood, CA 91609

and their agents and representatives (hereinafter the "Respondent") in violation of Section 4006 of Title 39, United States Code, which prohibits obtaining or attempting to obtain remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device, or substance, the same being specifically identified as the seven magazines ME #4, GIGI #3, SUSY Vol. 1 #1, MATCH, BUNNY #1, GOLDEN GIRLS #1, and GIRL FRIEND #1, and depositing or causing to be deposited in the mails information as to where, how or from whom the same may be obtained, the said evidence being a part of the record in the case identified below by docket number (hereinafter the "unlawful activity"),

Now, therefore, by virtue of the authority vested in the Postmaster General by the provisions of said law, and by him delegated to me (Public Law 86-676, approved July 14, 1960, and 26 F.R. 10813, November 18, 1961), I hereby forbid you to pay any postal money order drawn to the order of the said Respondent in payment for the adjudicated magazines. I further direct you to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon presentation of said order at the issuing office or, in the event the original order is not available, that repayment may be effected by means of a duplicate order obtained under regulations of the Department.

You are further directed to hold all mail, whether registered or not, which shall arrive at your office directed to the said Respondent except for so much thereof as can be identified on the face of the wrapper as not relating to the unlawful activity. All mail not so identified shall be held for 24 hours after its receipt, during which time the Respondent shall have the right to examine the mail so held at a reasonable time, in your presence or the presence of a postal employee designated by you, and receive such mail as is not connected with the unlawful activity, including mail requesting a refund or return of merchandise.

You are further directed to write plainly or stamp the word "Unlawful" upon the outside of all the mail connected with the unlawful activity and return it to the postmaster at the offices where it was mailed, to be returned to the senders. Where there is nothing to identify the senders of such mail it shall be sent to the appropriate dead letter branch with the word "Unlawful" plainly written or stamped thereon, to be disposed of as dead matter under the laws and regulations applicable thereto.

WILLIAM A. DUVALL,
Acting Judicial Officer.

U.S. GOVERNMENT PRINTING OFFICE: 1970